NO._____

IN THE DIVISION TWO

COURT OF APPEALS OF THE

STATE OF WASHINGTON

KEVIN WAYNE FRANKLIN,

Petitioner

VS.

STATE OF WASHINGTON,

Respondent

Petitioners Memorandum of Law and Opening Brief in Support of Personal Restraint Petition

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On collateral attack from The Pierce County Superior Court, Cause NO. 09-1-02724-4, Honorable Johns R. Hickman, Presiding Judge

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Kevin W. Franklin

DOC # 872978

ProSe Petitioner

W.S.P./ MSC

1313 North 13th Ave

Walla Walla, WA 98362-8817

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In Re: The Personal Restraint Petition Of:	)	
	)	**NO.**_____
	)	**PERSONAL RESTRAINT PETITION**
KEVIN WAYNE FRANKLIN	)	
Petitioner's Full Name		

A. STATUS OF PETITIONER

I, KEVIN WAYNE FRANKLIN DOC# 872978, Washington State Penitentiary (WSP) 1313 N. 13th Ave, Walla Walla, WA 98362-8817.

Apply for relief from confinement. I am X am not __ now in custody serving a sentence upon conviction of a crime.

1. The court in which I was sentenced is: Pierce County Superior.

2. I was convicted of the crime of Drive By Shooting; First Degree Assault.

3. I was sentenced after Trial on April 22, 2011.

4. The Judge who imposed sentence was Honorable John R. Hickman.

5. My lawyer at trial court was Michael J. Underwood, WSBA#13218, P.O. BOX 1071, Tacoma, WA 98401.

6. I did appeal from the decision of the trial court. (If the answer is that I did), I appealed to: Division Two Court of Appeals, Washington Supreme Court, U.S. Supreme Court.

7. My lawyer for my appeal was: Sheri Arnold, WSBA 18760, P.O. BOX 7718, Tacoma, WA 98417.

The decision of the appellate court was __was not X published.

8. Since my conviction I have __have not X asked a court for some relief from my sentence other than I have already written above.

9. If the answers to the above questions do not really tell about the proceedings and the courts, judges and attorneys involved in your case, tell about it here: This is my first Personal Restraint Petition.

B. GROUNDS FOR RELIEF:

I claim that I have 5 reasons for this court to grant me relief from the conviction and sentence described in Part A.

First Ground

1. I should be given a new trial or released from confinement because: The Pierce County Prosecutor violated my rights to a fair trial, jury trial and due process of law.

2. The following facts are important when considering my case. The facts are from the record in State v. Franklin, COA No.42031-7-II (2013) and the Attached exhibits herein.

3. The following reported court decisions in cases similar to mine show the error I believed happened in my case. See Appendix A (Memorandum of Law).

4. The following statutes and constitutional provisions should be considered by the court Washington State Constitution, Art. 1, Sec. 3, 21 and 22; U.S. Const. Amend(s) 1, 5, 6 and 14.

5. This petition is the best way I know to get the relief I want, and not other way will work as well because: I have no other avenues of relief to seek.

C. STATEMENT OF FINANCES:

If you cannot afford to pay the $250 filing fee or cannot afford to pay an attorney to help you, fill out this form. If you have enough money for these, do not fill this part of the form. If currently in confinement you will need to attach a copy of your prison finance statement.

1. I do X do not__ ask the court to file this without making me pay the $250 filing fee because I am so poor and cannot pay the fee.

2. I have $6.29 in my prison or institution account as of 04/10/2015. See Exhibit 1 (Trust Account).

3. I do X do not __ ask the court to appoint a lawyer for me because I am so poor and cannot afford to pay a lawyer.

4. I am __ am not X employed.

5. During the past 12 months I did __ did not X get any money from a business, profession or other form of self-employment.

6. During the past 12 months I:

Did ___ Did Not X__ Receive any rent payments.

Did ___ Did Not X__ Receive any interest.

Did X__ Did Not ___ Receive any dividends. If so, the total I received was $10 per week.

Did ___ Did Not X__ Receive any other money.

Do____ Do Not X___ Have any cash except as said in question 2 of Statement of Finances.

Do ___ Do Not X___ Have any savings or checking accounts.

Do ____Do Not X__ Own stocks, bonds or notes.

7. List all real estate and other property or things of value which belong to you or in which you have an interest. Tell what eat item or property is worth and how much you owe on it. Do not list household furniture and furnishings and clothing which you or your family need.

Items	Value
N/A	

8. I am ____ am not X married.

9. All of the persons who need me to support them are listed below:

Name & Address	Relationship	Age
Giana Zwang	Daughter	5 years

10. All the bills I owe are listed here:

Name & Address of Creditor	Amount
N/A	

D. REQUEST FOR RELIEF:

I want this court to:

__X___ Vacate my conviction and give me a new trial

_____ Vacate my conviction and dismiss the criminal charges against me without a new trial

E. OATH OF PETITIONER

STATE OF WASHINGTON)
) ss.
COUNTY OF WALLA WALLA)

After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

(Signature Here)

SUBSCRIBED AND SWORN to before me this 14 day of April 2015

Notary Public
State of Washington
JACQUELINE MINGS
MY COMMISSION EXPIRES
NOVEMBER 13, 2016

Jacqueline Mings
Notary Public in and for the State of Washington
Residing at Walla Walla County

If a notary is not available, explain why none is available and indicate who can be contacted to help you find a Notary: _____

_____

_____.

I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct.

DATED This _____ day of _____, 20___.

_____
(Signature Here)

EXHIBIT 1

Trust Account

PLRA IN FORMA PAUPERIS STATUS REPORT
FOR DEFINED PERIOD : 09/30/2014 TO 03/31/2015

DOC# :	0000872978	NAME : FRANKLIN KEVIN		ADMIT DATE :	04/26/2011
DOB :	03/07/1985			ADMIT TIME :	11:00

AVERAGE MONTHLY RECEIPTS	20% OF RECEIPTS	AVERAGE SPENDABLE BALANCE	20% OF SPENDABLE
52.50	10.50	6.29	1.26

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Petitioner's Memorandum of Law and Opening Brief

FIN THE COURT OF THE STATE

OF WASHINGTON FOR DIVISION TWO

In Re: The Personal Restraint Petition of: KEVIN WAYNE FRANKLIN, Petitioner	NO. PETITIONER'S MEMORANDUM OF LAW AND OPENING BRIEF

A. INTRODUCTION

Petitioner, Kevin Wayne Franklin, (hereinafter Franklin) applies for relief from confinement. Franklin submits that his restraint is unlawful pursuant to RAP 16.4 (b)(c)(2) (The conviction was obtained in violation of the State and Federal Constitutions).

Franklin contends the Pierce County Prosecutor committed misconduct by violating his First Amendment Rights to Association, Fourth Amendment Rights to be free from unlawful search and seizure, Fifth, Sixth and Fourteenth Amendment Rights to open and public trial, jury trial, proof beyond a reasonable doubt, fair trial and effective assistance of counsel., resulting in actual and substantial prejudice so as to justify reversal of his unlawful convictions.

B. STATEMENT OF THE CASE

Franklin relies on the statement of the case as reported by his Appellate Counsel's opening brief, attached as Exhibit A.

Franklin submits that additional facts supported by the record and exhibits herein, are stated in relation to each ground raised.

C. GROUNDS FOR RELIEF

In order to prevail on a collateral attack by way of personal restraint petition, the petitioner must first establish that a constitutional error has resulted in actual and substantial prejudice, or that a non-constitutional error has resulted in a fundamental defect which inherently results in a complete miscarriage of justice. In re: PRP of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004).

Franklin submits that the following constitutional errors raised have resulted in actual and substantial prejudice to his rights to a fundamentally fair trial. U.S. Const., Amend 14.

GROUND ONE

Franklin's State And Federal Constitutional Right To An Open and Public Trial Were Violated Where The Trial Judge Conducted An In Chambers Voir Dire And Excluded Family Members From The Court During Jury Selection

a. Relevant Facts

The following facts are reported from the official Pierce County Clerk's minutes, attached as Exhibits herein. Franklin submits a complete transcript of the Jury Voir Dire proceedings must be ordered for a full complete and accurate review of the errors in his jury selection.

On March 3, 2011, during jury selection, the following is reported from the Court Clerk:

11:57a.m. The in-chambers meeting is put on the record with regard to Juror #44 being excused for cause.

12:05p.m. The Court addresses the issue with regard to Juror #51 hearing defendant family members behind her talking about the case...

01:53 p.m. Bringing Juror #51 up to the courtroom for private questioning is discussed. Discussion regarding asking the family members to step outside while Juror #51 is brought up for private questioning.

02:12p.m. The Court has reviewed case law. The Court gives its ruling on the issue.

02:16p.m. Attorney Underwood has no disagreement with the Court's ruling.

02:17p.m. The family members are asked to leave the courtroom so that we can interview Juror #51.

02:22p.m. Juror #51 is brought into the courtroom for private questioning.

02:39p.m. The 40 jurors re brought up and seated. See Clerk's Minutes at Exhibit B.

The jury was later picked and seated.

For reasons argued below, Franklin makes a prima facie showing of constitutional error that requires further development of the record and facts.

b. The Clerk's Minutes Show an In Chambers Juror Questioning And The Exclusion Of Family Members From an Open And Public Court

In both instances of jury selection, the In Chambers questioning and the exclusion of courtroom observers, amounts to structural error. Further, because the issue was not raised on direct appeal by Appellate Counsel, Franklin was denied his rights to effective appellate counsel. See Ground 7.

Both the United States and Washington Constitutions protect (1) a criminal defendant's right to a public trial, U.S. Const. Amend. 6 and WASH. Const. Art. 1, § 22; and (2) the public's right to the open administration of justice, U.S. Const. Amend. 1 and WASH. Const. Art. 1, § 10; State v. Easterling, 157 Wn. 2d 167, 137 P.3d 285 (2006); Waller v. Georgia, 467 U.S. 39 (1984).

Whether a courtroom closure violates a defendant's right to a public trial or the public's right to the open administration of justice is a question of law reviewed de novo. State v. Brightman, 155 Wn.2d 1, 288 P.3d 113 (2012). State v. Wise, 176 Wn.2d 506, 122 P.3d 150 (2005).

A trial court violates these rights if it closes the courtroom during a public proceeding, unless the trial court previously determines that closure is warranted under the five part test in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), Wise, 176 Wn.2d at 12.

Franklin shows that parts of his jury selection process was conducted "in chambers," when the trial court returned on record and stated "Juror #44 is being excused for cause" and with the exclusion of family spectators, for a private jury questioning.

The guarantee of open proceedings extends in criminal cases to "the process of juror selection, which is itself a matter of importance, not simply to the adversaries but to the criminal justice system". In Re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004)(quoting Pres.-Enter. Co. v. Superior Court, 464 U.S. 501 (1984). "A closed jury selection process harms the defendant by preventing his family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals". Brightman, 155 Wn.2d at 515 (citing Orange, 152 Wn.2d at 812). In Brightman, the Supreme Court held that the defendant's public trial rights were violated, where the trial court closed the courtroom to spectators during jury selection.

In State v. Wise, supra, the Supreme Court held; The trial court violated defendant's right to public trial by questioning individual jurors "in chambers", without first engaging in the Bone-Club analysis, even though defendant was present with counsel during such questioning.

See also State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) (Trial courts in chambers questioning of jurors violated defendant's right to a public trial and waiver did not apply), In Re Morris, 156 Wn.2d 157, 288 P.3d 1140 (2012). The same will apply if the record shows the trial court did not perform the Bone-Club analysis before the closures in Franklin's jury selection.

The court must order a complete verbatim transcript of the March 3, 2011, jury voir dire, for a determination of Franklin's public trial grounds. See RAP 16.15 (h) (If the restraint is imposed by the state and if the Appellate Court determines that petitioner is indigent, the court may provide for the appointment of counsel at public expense for services in the Appellate Court, order waiver of charges for reproducing briefs and motions, "provide for the preparation of the record of prior proceedings and provide for the expenses of such other expenses as may be necessary to consider the petition in the Appellate Court).

Franklin submits that a review of the jury voir dire will enable this court to reach a just decision on the merits of Franklin's claims.

Upon finding further errors, remand for a new trial is the remedy for public trial violations.

GROUND TWO

The Affidavit And Search Warrant Used To Search The Contents Of Franklin's Cellular Phone Fails The Aguilar-Spinelli Test And The Warrant Issued Fails Particularity Requirement Of The Fourth Amendment Resulting In An Unlawful Search and Seizure

a. Relevant Facts

Prior to trial, Franklin's co-defendant, Desmond Johnson, filed a Motion to Suppress through his attorney of record. See Motion to Suppress at Exhibit C. Franklin's attorney, "Adopted Defendant Desmond Johnson's Motion to Suppress." See "Adoption Motion," at Exhibit D.

Franklin reincorporates both motions for purposes of his collateral attack. Findings of Facts and Conclusions of Law were entered on April 22, 2011. See Findings and Conclusions at Exhibit E.

Counsel for Franklin argued below that the police were on fishing expedition as there was no nexus between what occurred and the occupants. 3-7-11, RP 133, 136, 142. The trial judge, Honorable John R. Hickman, denied the Motion to Suppress, finding that the prior judge had reason to believe there would be a nexus between what occurred and the occupants. 3-7-11, RP 144. For reasons argued, the probable cause and warrant is lacking the Fourth Amendment requirements.

b. The Pierce County Police Made A Warrantless Search Of Franklin's Cellular Phone And The Warrant Fails The Particularity Requirement.

The 4th Amendment of the United States Constitution provides that: No warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The Washington Constitution, Art 1, § 7, affords greater protection than does the Fourth Amendment. Warrants that fail the particularity requirement are unlawful. Groh v. Ramirez, 540 U.S. 551 (2004); State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993).

In the case at bar the affidavit and warrant to search did not issue in Franklin's cause and criminal case but instead authorizes a search and seizure relating to the charge of First Degree Murder in a separate case and cause number. See Complaint for Search Warrant at Exhibit F. The cause number is under State v. Johnny Morris, cause No. 09-1-50597-9.

Franklin was charged in a total separate cause, for Assault 1°, Drive By Shooting and Unlawful Possession of a Firearm in cause No. 09-1-02724-4. See Third Amended Information at Exhibit G.

The Affidavit and warrant issued is directing officers to search for evidence relating to the "First Degree Murder" charge in Johnny Morris's case. Officers cannot use one warrant to search for evidence of any possible crimes in separate causes. State v. Riley, supra.

"When police rely on generic classification in a search warrant, the search must be circumscribed by reference to the crime under investigation." Riley, Wn.2d at 28-29. See also State v. Eisele, 9 Wn. App. 174, 511 P.2d 1368 (1973) (Affidavit specifying search for LSD cannot support warrant specifying marijuana). In this case, the police went on a bit further, as did the prosecutor, by using an affidavit and warrant relating to a murder investigation to conduct an exploratory search for evidence of any other crime in general. Consequently, the search in Franklin's case was invalid since the warrant was directed to search for evidence of a murder Franklin was not charged for.

A warrantless search is per se unreasonable and its fruits will be suppressed. State v. Hamilton, 179 Wn. App. 870, 320 P.3d 142 (2014) (Div. 2).

Purpose of search warrant particularity requirement are the prevention of general searches, prevention of seizure of objects on the mistaken assumption that they fall within the issuing magistrates authorization, and prevention of warrants on loose, vague, or doubtful bases of fact. State v. Perrone, 119 Wn.2d 588, 834 P.2d 611 (1992); U.S. Const. Amend. 4; Wash. Const., Art. 1, § 7.

The prosecutor in Franklin's trial used prejudicial pictures and text messages to prove gang involvement and this evidence must be suppressed.

Franklin raises this ground for the first time on collateral review and submits it was not effective for his trial and Appellate Counsel not to raise these errors. See Grounds 6, 7; State v. Hamilton, Supra.

c. The Affidavit Fails The Aguilar-Spinelli TEST

As stated by trial counsel in the Motion to Suppress, the affidavit fails to indicate a basis of knowledge of reported calls and now these calls provide a nexus between the crime under investigation (murder) and the defendant's calls.

In Washington, the affidavit to support a search warrant must supply a reviewing magistrate of the basis of knowledge and Informants veracity. State v. Jackson, 102 Wn.2d 432, 688 P2d 136 (1984).

The two prong test examines the informant's basis of knowledge and the informant's veracity. Under the basis of knowledge prong, the facts reported must enable the person making the probable cause determination to decide whether the informant had a knowledge basis for alleged criminal conduct reported. Under the veracity prong, facts must be presented so that the magistrate can determine either the inherent credibility of the informant on the particular occasion or other facts showing informant veracity. Spinelli v. United States, 393 U.S. 410 (1964); Aguilar v. United States, 378 U.S. 108 (1964).

Here the affidavit for search warrant fails this test and should also be a ground for suppression, despite the particularity requirement being violated.

GROUND THREE

Franklin's 1st, 6th and 14th Amendment Rights to Association, Fair Trial, and Due Process of Law

Were Violated By The Admission Of Highly Prejudicial Propensity And Gang Evidence

Franklin submits that the interests of justice will best be served by re-examining this ground for relief that was preciously raised on direct appeal and denied. Franklin's appellate counsel, failed to raise his 404 (b) claim as a violation of State and "Federal Law" and to fully exhaust this issue, Franklin brings an issue of Federal Constitutional Law that must be fully exhausted. See Title 28 § 2254 (b)(1)(A) (the applicant has exhausted the remedies available in the Courts of the State).

Franklin incorporates his appellate counsel's opening brief and facts therein.

a. Relevant Facts

The state was allowed to saturate Franklin's trial with highly prejudicial and irrelevant propensity evidence and gang evidence, which stripped Franklin of his constitutional rights to have a fair and impartial trial and rights of association. The state alleged only that the defendants were gang members and that gang members, as a class of people who banded together to commit crimes, were violent, used gang names to confuse police and responded with violence to challenges. RP 1458-59, 1461-1466, 1475, 1480. Detective Ringer also testified about how reputation and street credibility is very important to gangs and gang members respond to challenges to their street credibility with heightened levels of violence in order to maintain their street credibility. RP 1483-85. Detective Ringer testified that the response to disrespect was usually disproportionate to the act of disrespect. RP 1488. Also, that "on this situation here, a little offense can result in a tragic situation. A lot of times the innocent people are the ones who are the victims of that." RP 1488-89. Detective Ringer testified that the taking of Mr. Kennedy's necklace was a serious sign of disrespect to both Mr. Kennedy as well as Mr. Kennedy's gang and that Mr. Kennedy would have to respond to it. RP 1499.

The clear meaning of Detective Ringer's testimony was that Mr. Kennedy and the men in the Explorer were retaliating for the theft of Mr. Kennedy's necklace but the actions of the men culminated in the death of Mr. Ragland, the victim of the homicide on 74th and Oaks. Mr. Franklin showed the trial court abused its discretion admitting the 404 (b) evidence. See Brief of Appellant at 47-52.

b. Argument

This United States Supreme Court has long held that the First Amendment protects an individual's right to join groups and associate with others holding similar beliefs. See Aptheker v. Secretary of State, 378 U.S. 500, 507 (1964); NAACP v. Alabama extrel, Patterson, 357 U.S. 449, 460 (1958).

The Supreme Court also held that the First and Fourteenth Amendments prohibit the introduction of the fact that a defendant is a member in a gang where the evidence has no relevance to the issues being decided in the proceeding. See Dawson v. Delaware, 503 U.S. 159 112 S. Ct. 1093, 117

L.Ed.2D 309 (1992) (Because the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had endorsed such acts, the Aryan Brotherhood evidence was also not relevant to help prove any aggravating circumstances.)

The same must be said in Franklin's case. The state prosecutor and this Court of Appeals held the gang evidence was necessary to prove intent and to prove franklin's gang aggravated sentencing factors. However, the state prosecutor did not seek the gang enhancement at sentencing, but instead used the sentencing aggravators as a guise and bootstrap to introduce the gang evidence in trail. CP 180-182. The jury found that all crimes were committed to benefit a criminal street gang and that Franklin was armed with a firearm during the commission of the first degree assault. CP 515, 517, 520. At sentencing the prosecutor elected not to seek additional punishment for the "gang aggravators."

This allowed the jury to draw the inferences that just because of Franklin's abstract beliefs and gang associations, then any criminal activity engaged in by Franklin and his co-defendants must benefit their respective gangs.

However, as in Dawson v. Delaware, supra., the prosecution in Franklin's trial, did not prove that the shooting (that was caused because of a stolen gold chain) was gang related in any manner, other than the individuals involved happened to all be members of various Crip sets in Washington. Therefore, the evidence was not relevant to help prove elements of the state's case and aggravating factors.

The admission of this generalized gang evidence deprived Franklin of his constitutional rights of association, due process of law and a fair trial. See Estelle v. McGuire, 502 U.S. 62 (1991) (Prohibiting admission of evidence if it so infused the trial with unfairness as to deny due process of law.) Here the irrelevant gang evidence so infused Franklin's trial with unfairness as to deny due process of law. Likewise the admission of facts stemming from a separate homicide case amounts to extreme prejudice so as to justify reversal of Franklin's convictions. U.S Const. Amend. 1, 5, 6 and 14.

c. Detective Ringers improper opinion testimony violated Franklin's constitutional rights to present a complete defense and rights to fair trial.

Franklin incorporates relevant facts from this Court of Appeals Opinion, pages 9-11, 34-38, Opinion at Exhibit H. As stated in the opening Brief of Appellant, Exhibit A, and the opinion, Exhibit H, Detective Ringer stated, " Almost 100% of the time a gang member is not going to be totally honest with law enforcement in an interview...The whole culture of the gangs says you don't cooperate with the police...you certainly don't talk honestly with the police...When we find a gang member who's willing to talk, we approach if very sort of apprehensively as far as whether he's going to tell the truth or not. We take everything with a grain of salt. We work through the issues and try to get as much of the truth as possible, but we go in anticipating that they're not going to be truthful with us."

Franklin's defense counsel did not object to this testimony, seek a curative or limiting instruction, nor moved to strike this prejudicial testimony. This was ineffective. See Ground 6. Detective Ringer's testimony was in regards to Jerome Kennedy's statements to the police.

Franklin testified in his own defense, that he was asleep in the backseat of the Explorer and the next thing he remembered was waking up to the sound of "gunshots" and being tossed around. RP 1644-45.

Jerome Kennedy was called by the prosecutor and testified that Franklin was in fact asleep and did not "know" Kennedy was going to shoot at Morris. RP 1148-1153. This testimony by Kennedy corroborated Franklin's defense and testimony and therefore the generalized opinions by Detective Ringer, violated Franklin's rights to present a defense and rights to a fair trial. U.S. Const. Amend. 5, 6 and 14; Washington v. Texas, 388 U.S. 14 (1967).

Opinion testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury to make an independent determination of the relevant facts. State v. Kirkman, 159 Wn.2d 18, 155 P.3d 125 (2007). The improper testimony of a police officer raises additional concerns because "an officer's testimony carries a special aura of reliability." Kirkman, 159 Wn.2d at 928.

To determine whether a statement constitutes improper opinion testimony, a court considers the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. State v. Montgomery, 163 Wn.2d 577, 193 P.3d 267 (2008).

Detective Ringer's testimony was the only evidence to prove general gang belonging and inflammatory characteristics of gangs and gang members, such as Franklin and co-defendants.

Ringer's opinions on the credibility of Kennedy and "gang Members" to be untruthful, uncooperative, and dishonest, invaded the jury's province to determine the credibility of each witness individually.

The opinion on the credibility of "gang members," allowed the jury to infer that Kenney is being dishonest in corroborating Franklin's testimony and that Franklin's testimony must be dishonest because Franklin is a gang member. By invading the jury's province, the admission of improper opinion testimony may violate a defendant's constitutional right to jury trial. State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001) (plurality opinion). Detective Ringer's opinion testimony, carried an aura of reliability that violated Franklin's U.S. Const. 1, 5, 6 and 14 Amendments, rights to jury trial, proof beyond a reasonable doubt, due process, fair trial and rights to present a defense. Detective Ringer's testimony is attached as Exhibit I, in its entirety.

This testimony had a substantial and injurious effect on the fundamental fairness of Franklin's trial. See Brecht v. Abrahamson, 507 U.S. 619 (1993). See also Yates v. Merolillo, 663 F.3d 444 (9th Cir. 2011) (Admission of doctor's opinion testimony had a substantial and injurious effect or influence in determining the jury's verdict); U.S. Const. Amend 5, 6, 14. The same must apply in the instant case and a new trial granted.

GROUND FOUR

The Accomplice Liability Instructions And The INSTRUCTIONS AS A WHOLE RELIEVED THE State Of Its Burden Of Proof And Denied Franklin A Fair Trial.

a. Relevant Facts

The prosecutor in Franklin's trial made it clear that he would seek a conviction by any means necessary when stating to the trial judge that "but for the actions of the defendants' the other victim of the other shooting would be alive" and the State tried to come up with a theory under State Law how it could hold Franklin accountable for the other shooting but it couldn't. RP 773.

However, the prosecutor did find a way to overcharge Franklin and convict Franklin of crimes he was not legally guilty of.

In discussing jury instructions, the prosecutor informed the defense and trial Court that the State will be proposing a "in for a dime, in for a dollar" jury instruction and theory, based on a text message that stated Franklin was going to give someone the blues for breaking into his car the night before. The prosecutor the stated that the defense would be precluded from arguing that he didn't know there would be a shooting, See 3-23-11 RP 1584-86 at Exhibit J.

The prosecutor accomplished this in closing arguments when stating the following remarks to the jury:

"And so in order to be an accomplice, the first thing you have to have is knowledge of the crime."

This is the most important aspect, though, in this case of accomplice liability.

"The crime is assault, not assault first degree, not assault second degree, and assault." RP 1799.

The prosecutor then gives a robbery and assault analogy and continues, "If a person is trying to shoot someone and cause them great harm, then they're also causing them to fear logically. A misdemeanor assault is just an offensive touching. It's based –some parts of the distinction are how much harm was actually caused. So you can see it's an umbrella that starts at the highest with assault one but the others are underneath that umbrella." RP 1800.

In rebuttal, the prosecutor continued to confuse the jury on the Accomplice Liability Standard., "The Accomplice Liability Instruction states the person is an accomplice in the commission of "a" crime if with knowledge that it will promote or facilitate the crime. RP 1856.

"Accomplice, a principal, same thing. The guy driving the car is just as guilty as the guy who robs the bank under the law. Accomplice just is a definition of what a person's roll potentially was or how they participated in the crime. But the culpability is equal if the person had knowledge of the crime that was to be committed. I would suggest to you again that the planning took place well before hand as

evidenced by I'm going to give somebody the blues, getting together with apparently disparate people, two guns in the vehicle, not just Mr. Kennedy's two." RP 1857-58.

The jury instruction reads in relevant part, "A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime. See Instruction No. 9 at Exhibit K, (Courts Instructions to the Jury).

During jury deliberations the jury sent out a note, asking for "clarification on instruction No. 9 as to the words "a crime" and "the crime."

"The jury would like more explanation on "knowledge of a crime" and "knowledge of the crime of drive by shooting." See Jury Question at Exhibit L.

The prosecutor informed the court that the instruction on accomplice liability is correct and the jury is getting the "a crime" language, from the "knowledge" instruction. Defense counsel agreed and the Court was to refer the jury back to their instructions as given. RP 183-94 at Exhibit M.

After 5 and a half days of deliberating, the jury returned with its verdict.

b. The Accomplice And Knowledge Instruction, Read Together Are Unconstitutional And Ambiguous Based On The Prosecutor's Alteration Of The Mens Rea Defining Knowledge.

The State was required to prove that Franklin knowingly facilitated a drive-by shooting First Degree Assault, Second Degree Assault, and Unlawful Possession of a Firearm. The State was relieved of this burden because the definition of knowledge for Accomplice Liability, fails to mirror the statutory definition required by law.

Accomplice liability attaches only when the accomplice acts with "knowledge" of the specific crime that is charged, rather than with knowledge of a different crime or generalized criminal activity. State v. Roberts, 142 Wn.2d 471, 14 P.2d 713 (2000). U.S. Const. Amend. 14. Franklin's jury was provided the following definition of knowledge:

"A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact. It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact." See Jury Instruction No. 17 at Exhibit K.

This instruction does not comport with the statutory definition of "knowledge." Which is the "mens rea" required of an accomplice. RCW 9A.08.020 (3)(a); Roberts, at 510. RCW 9A.08.010 (1)(b), defines "Knowledge" in the following terms:

A person acts knowingly or with knowledge when he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or he or she has information that would lead an ordinary person in the same situation o believe that facts exist that are described by a statute as defining an offense.

It is clear that the "knowledge" definition provided to Franklin's jury is not a lawful and legal definition.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole, properly inform the jury of the applicable law. State v. Studd, 137 Wn.2d 533, 973 P,2d 1049 (1999). In reviewing ambiguous instructions the question is, "Whether there is a reasonable likelihood that the jury had applied the challenged instruction in a way that violates the Constitution." Estelle v. McGuire, 502 U.S. 62, 72 (1991).

This Court must easily find that the jury instructions as a whole, relieved the State of its Constitutional burden to prove every "element" of the crimes charged.

The Due Process Clause of the Fourteenth Amendment, "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In Re Winship, 397 U.S. 358 (1970). As a consequence, a jury instruction is constitutionally defective if it has the effect of relieving the State of the burden of proof enunciated in Winship." Sandstrom v. Montana, 442 U.S. 510, 521 (1979).

The knowledge definition infected the jury instructions as a whole because knowledge is the Mens Rea of all the crimes charged in Franklin's trial and unconstitutionally relieved the State of its burden of proof.

See Instructions No, 11 (Reckless Definition as to Drive By); No. 16 (Unlawful Possession of Firearm); No. 19 (To Convict of Unlawful Possession of Firearm); No. 26 (To Convict for Assault 1, With Intent) No. 38 and 39 (Gang Aggravator Definitions That Require Intent). Exhibit K.

The intent instruction compounded the jury's confusion as well. The intent instruction stated "A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime." See No. 22.

In isolation, the accomplice Liability and Intent Instruction do not misstate the law, but when viewed as a whole with the knowledge definition, the jury's questions, and the prosecutor's statements to the Court and jury, the instructions are misleading. Actual and substantial prejudice is evident based on the record before this Court.

The jury never had to consider Franklin's knowledge of "the crimes" because the knowledge instruction informed the jury to convict based on Franklin's general knowledge of any facts the jury could infer as criminal in general.

c. There Is A Reasonable Likelihood That The Jury Applied The Instructions That Relieved The State Of Its Burden Of Proof.

Having established that the jury instructions misstated the law and were ambiguous, Franklin submits his convictions must be reversed for the following reasons:

1) The prosecutor informed the jury that Franklin's text to give someone the blues was the knowledge of the crime;

2) Franklin's intent to give someone the blues for breaking into his car was used to prove elements of Drive By and Assault;

3) The knowledge definition allowed the jury to convict based on generalized knowledge of a "fact," of some prior wrong doing, or criminal behavior, such as looking for someone who broke into Franklin's vehicle "with disparate people who had guns in the vehicle." RP 1857-58.

4) The knowledge definition allowed conviction absent proof 'that Franklin had knowledge' of "the crimes" of Drive By and Assault, because the definition state "It is not necessary that the person know that the "fact" is defined by law as being unlawful or an element of a crime."

5) The knowledge instruction allowed the jury to use an alleged facts of criminal behaviors, i.e., being a gang member, carrying guns, looking for someone responsible for breaking into a car; as facts **necessary** to prove motive and intent for "the crimes" of Drive By and Assault.

6) The intent instruction, combined with the faulty knowledge definition, mislead the jury into believing that intent is found solely from the "FACT", of looking for someone who broke into Franklin's vehicle, being with armed gang members, and having some type of criminal disposition, where the intent instruction told the jury that "a person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes 'a crime'. See Intent definition at No. 22. Now see No. 17 concluding paragraph of knowledge definition allowing the jury to use some type of "FACT" as an element, "When acting knowingly as to a particular fact is required to establish an element is also established if a person acts intentionally as to that fact."

7) The jury was allowed to infer intent, from any fact admitted in Franklin's trial and relieved of the burden that "Franklin knowingly" was an accomplice to the crime of DRIVE BY, ASSAULT AND UNLAWFUL POSSESSION OF A FIREARM.

8) The evidence introduced in trial only showed Franklin and his co-defendants (who admitted that Franklin had no knowledge of their crimes) were called to the rescue of a friend, who was scared that Johnny Morris pulled a gun out of his trunk and was following him. See RP 1154-59, RP 1240,

1640-42. Co-defendant Kennedy admitted firing the guns because Morris reportedly stole his chain and Franklin had nothing to do with the shooting, nor was is gang related. RP 1152-53, 1129-30.

9) There is not scintilla of evidence introduced in Franklin's trial, proving beyond a reasonable doubt, that he knowingly aided, promoted, solicited, commanded, encouraged, requested, facilitated or planned 'the crimes' of Drive By Shooting, Assault 1 and 2 and Unlawful Possession of a Firearm.

Because the prosecution was relieved of its burden to prove accomplice Liability and the Knowledge Requirements of each offense charged, Franklin's convictions must be reversed.

"Under statutory scheme creating hierarchy of mental states for crimes of increasing culpability, jury must find actual, substantial knowledge if knowledge is required to be proven, and instruction that effectively redefines knowledge to mean negligent ignorance violates Due Process." State v. Vanoli, 86 Wn. App. 643, 937 P.2d 116 rev. denied 133 Wn.2d 1022 (1997). See also Liparot v. United States, 471 U.S. 419 (1985) (Statute did not explicitly spell out the mental state required to convict a defendant). Id. at 424. Likewise, Franklin's knowledge instruction violates Due Process.

A jury instruction that relieves the state of its burden to prove any element of the crime is an error of Constitutional magnitude that may be reviewed for the first time. Franklin's Constitutional Rights to fair trial and due process is implicated by erroneous jury instructions. The errors in the jury instructions had practical and identifiable consequences in the trial. Thus the error was manifest and failure to preserve the issue at trial does not preclude review. State v. Ridgely, 141 Wn. App. 771, 174 P.3d 105 (2007) (Div. 2).

Further, it was ineffective not to challenge the prosecutor and this gross and blatant violation of Franklin's rights to Jury Trial, Proof of Innocence, Fair Trial and Due Process. U.S. Const. Amends. 5, 6 and 14.

Reversal is required for these errors, however there remains more.

d. The Definition for Assault In The First Degree Relieved The State of Its Burden of Proof

To convict Franklin of Assault in the First Degree, the jury's to convict instruction stated in part:

To convict the defendant Kevin Franklin of the crime of Assault in the First Degree as charged in count III, each of the following elements must be proved beyond a reasonable doubt:

(1) That on or about the 31st day of May, 2009, the defendant or an accomplice assaulted Benjamin Grossman;

(2) That the defendant or an accomplice was armed with a firearm;

(3) That the defendant or an accomplice acted with intent to inflict great bodily harm. See No. 26, to Convict Instruction. The jury was instructed on an improper definition for assault.

In instruction No. 25, defined Assault as follows:

The following definition of assault is to be used only when considering the crime of assault in the First Degree as charged in count III:

An assault is an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict bodily injury be inflicted.

Defense counsel did not object to this instruction. The instruction allowed the jury to convict based on an intent to inflict "bodily injury," rather than the required "intent to inflict great bodily harm," as required by law. See RCW 9A.36.011 (a); U.S. Const. Amend. 14, In Re Winship, supra...

This relieved the State of its burden to prove intent to inflict great bodily harm and should be considered with the rest of the instructional errors raised. See State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) ("Invited error doctrine and failure to object to instruction did not preclude review of defendant's argument that jury instructions improperly lowered the burden of proof and counsel's act of proposing an erroneous act on appearances instruction constitutional deficient performance.")

"It is presumed that a clear misstatement of the law in a jury instruction is prejudicial." State v. Wanrow, 88 Wn.2d 221, 559 P.2d 548 (1977).

e. The Jury Was Charged with An Improper Reckless Instruction

Lastly, the State was further relieved of its burden of proof by the reckless definition, in Instruction No. 11. The instruction read in relevant part:

A person is reckless or acts recklessly when he or she knows of and disregards a "substantial risk that a wrongful act "may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation. See Reckless Definition at Exhibit J, No. 11. This was error.

In State v. Harris, 164 Wn. App. 377, 263 P.3d 1276 (2011), this Division Two Appellate Court relieved the State of its burden to prove a substantial risk of "great bodily harm."

Likewise, the instruction in Franklin's trial, failed to convey the necessary language of the Drive By statute. That is "substantial risk of death or serious physical injury." See Instruction No. 10, defining Drive By Shooting.

Franklin submits this is a faulty charge to the jury that relieved the State of its burden to prove each essential element of "the crimes" beyond a reasonable doubt. U.S. Const. Amend. 14, In Re Winship, supra.

This Court should reverse these errors.

GROUND FIVE

The Prosecutor Committed Flagrant Misconduct by Repeatedly Telling The Jury Its Duty Is To Declare The Truth of The Trial by Piggybacking Detective Ringer's Prejudicial Opinion Testimony

In Closing Arguments, Appealed To The Passions And Prejudices of The Jury, Distorted Accomplice Liability, Provided Express Opinions On Franklin's Credibility and Relied On Facts NOT In Evidence To Obtain A Conviction.

The prosecutor flagrantly and ill intentionally, stated the following improper remarks to the jury:

"One of the things that can't be under emphasized about a case like this is you've heard so much about gangs and shootings and violence, and retribution, those kinds of things."

"And I believe as a society, to an extent, people become numb to it. Then you're analyzing situations with an understanding that it's acceptable for people not to talk to police, or to lie to police, or to get on the stand and basically commit perjury." RP 1785. "Now remember, the first thing I asked in jury selection was, how important would it be for you to return a verdict that represents the truth about what happened. Everybody said that's what we're here for." "That's justice, that's our system. You can't get a correct decision unless you get the truth about what happened."

"Well, that's exactly accurate." "But in reality this is the truth you have to decide. This is what you're here for is the truth of the elements, the truth of the charges as the Court read."

"So in this to convict, it says you on the 31st day of May, 2009, the defendant or accomplice assaulted Benjamin Grossman. You have to find the truth of that beyond a reasonable doubt. If in any one of these elements you can't come to a truth that was proved, then it's not guilty. You're going to have doubts about especially in this case, certain aspects of what happened. Who told the truth on the stand? I mean that's going to be tough one for you. Who was telling the truth out there when they were talking to law enforcement, and what parts of what they were saying was true? What parts were to protect themselves from criminal liability; what parts were to protect others?

These kinds of issues, you know, unfortunately, but certainly expected, are what this process is all about. That's your job. You're the fact finders to determine what's true. Well, thankfully you don't have to go by what people say. You go b other evidence, of course physical evidence, circumstantial, and direct." RP 1795-97.

"Mr. Franklin handed Mr. Johnson the gun." RP 1805. "Then every single one of these guys did not tell the truth to law enforcement in some respect or another about who they knew, about how long they knew them, who they were with that evening." RP 1807. "They're not scared of police officers there. They just shot a bunch of people. They've got stories." RP 1810.

"Why does a person not tell the truth? Because they have something to hide."

"Mr. Franklin, but for the position in the vehicle, he's the shooter. He certainly had knowledge, he certainly had motive." RP 1811.

In rebuttal the prosecutor stressed general gang activity and that somehow the shooting was motivated for gang activity and that somehow the shooting was motivated by gang retaliations and tensions.

"Mr. Franklin is not credible on the stand."

"Kennedy being a scary guy. You know, the State believes based on his appearance in court, his fear, the phone calls that Franklin's making, you know he's checked, he's a snitch, he can no longer call himself K loc, that kind of stuff. He's on the stand doing everything he can now to go back on what he did, which is talk to law enforcement early on. Give statements, inculpate others, that kind of thing. That word got out. He's a marked man. He appeared to be a scared person. Now that plays into assessing the credibility of him on the stand and the overall case is just a myth. It's a dispute the state has with the defense." RP 1859.

"You know when you watch T.V., you see people shoot guns and you see people fall, and its' just no big deal because they're not dead.

Children watch T.V. shows like that. You' know we're numb to it.

We're absolutely numb to the violence in our culture.

But on that street, two people took heavy guns and they weren't on T.V. " RP 1860. Defense counsel did not object.

The prosecutor's entire closing is attached as Exhibit N.

b. Argument

The right to a fair trial is a fundamental liberty secured by the 6th and 14th Amendments to the U.S. Const. and Art. 1, Sec. 22 of the Wash. Const. Estelle v. Williams, 425 U.S. 501, 503 (1976); State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999).

"A fair trial certainly implies a trial in which he attorney representing the state does not throw the prestige of his public office...and the expression of his own belief into the scales against the accused." State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011).

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, the prosecutor must seek convictions based on probative evidence and sound reason. State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011). In order to prevail on a claim of prosecutorial misconduct, a defendant must show that the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. Thorgerson, 172 Wn.2d at 442.

Franklin makes this showing.

First, it is improper for a prosecutor to state that the jury's role is to declare the truth or search for the truth. State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009); State v. Emery, 174

Wn.2d 741, 278 P.3d 653 (2012). These statements are improper because the jury's job is not to search for the truth of what happened...Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt. Emery, 174 Wn.2d at 760.

Second, it's improper for a prosecutor to express his personal opinion of the defendant's guilt or his belief in the credibility of a witness. State v. Warren, 165 Wn.2d 17, 195 O.3d 940 (2008); U.S. v McKay, 771 F.2d 1207 (9th Cir. 1985).

Third, the prosecutor should not use arguments calculated to inflame the passions and prejudices of the jury. State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995); U.S. v. Johnson, 968 F.2d 768 (8th Cir. 1992) (reversing drug conviction based on prosecutor's inflammatory appeal to jurors as the conscience of the community).

Fourth, it is elementary that a prosecutor commits error when submitting evidence to the jury that has not been admitted in trial. State. v. Pete, 152 Wn.2d 546, 98 P3d 803 (2004). See also Berger v. United States, 295 U.S. 78 (1935) ("official imprimatur placed upon the prosecution misstatement of the law and facts obviously amplified their prejudicial effect upon the jury").

Fifth, a prosecutor's misstatement of the law during argument can be grounds for reversal of a conviction – even if the trial courts instructions to the jury correctly state the law. Brown v. United States, 766 A.2d 530, 541-43 (D. C. 2001); State v. Fleming, 83 Wn. App. 209, 920 P.2d 1235 (1996) rev. denied 131 Wn.2d 1018 (1997).

Lastly, the prosecutor's errors in the case at the bar, are so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. Emery, 174 Wn.2d at 760-61. However, Franklin's trial counsel did not object and this was clearly ineffective. See Ground 6.

Review is limited to what occurred in closing when assessing the prejudice. The law on a prosecutor's declare the truth statements, has been clear since Anderson, in 2009. In the case at the bar, the prosecutor explained this type of declare the truth, search for the truth, statements in opening voir dire.

"Everybody said that's what we're here for." RP 1795-96.

"A prosecutor's improper search for the truth remark can confuse the jury about its role and the burden of proof." Emery, 174 Wn.2d at 763. But a proper instruction can dispel that confusion. Emery, 174 Wn.2d at 764.

Because the prosecutor convinced the jury during jury selection, that its role is to determine the truth and continued throughout closing arguments, to explain the jury must "find the truth beyond a reasonable doubt," no proper instruction could have cured the prejudice.

The jury was led into believing that it's role was to find the truth from the beginning to the end of the trial. The prosecutor impeached Kennedy and Franklin and then explained to the jury that both defendants are untruthful. This allowed the jury to convict by using an incorrect unreasonable doubt

standard. If all the prosecutor has to show and prove was some type of untruthfulness, in regards to Franklin and his codefendants testimony, then it's easy to conclude that the jury convicted Franklin using "its role to determine the truth." This relieved the State of its burden of proof and violated due process of law U.S. Const. Amend. 14.

Franklin submits that the cumulative effect of prosecutorial misconduct in his case "so infected the trial with unfairness, as to make the resulting conviction a denial of due process of law." Donelly v. DeChristorforo, 416 U.S. 637 (1974).

Franklin seeks a new trial for the misconduct that permeated his trail.

GROUND SIX

Franklin Was Denied The Effective Assistance of Trial Counsel

Effective assistance of counsel is guaranteed by the Sixth Amendment of the U.S. Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Wash. Const. Art. 1 , Sec. 22; State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987).

To establish that trial counsel's representation was inadequate, Franklin must show that counsel's performance was deficient i.e., that it fell below an objective standard of reasonableness – and that the deficient performance was prejudicial. Strickland, 466 U.S. at 687-88. The proper measure of attorney performance is reasonableness under the prevailing norms. Id. at 688. In order to demonstrate prejudice arising from counsel's deficient performance, Franklin must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

"A reasonable probability" is less than preponderance: "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have undermined the outcome." Strickland, 466 U.S. at 694.

Failure to lodge an appropriate objection constitutes deficient performance if there was no discernible tactical reason for the failure to object. State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) (deficient performance for counsel to fail to object to inadmissible evidence of prior convictions. "We cannot discern a reason why Hendrickson's counsel would not have objected to such damaging and prejudicial evidence.")

During Franklin's trial, there were numerous occasions when a timely objection by trial counsel, for example, during Detective Ringer's opinion testimony, to the prosecutor's improper arguments to the jury, to instructions that misstate the law, to an illegal search warrant on the proper grounds, or to the jury voir dire conducted in chambers excusing juror #44 and to the removal of family spectators from the court, could have prevented the jury's exposure to improper and highly prejudicial evidence, instructions and arguments. Similarly, trial counsel could have sought limiting instructions, curative

instructions and or move to strike inadmissible evidence. Trial counsel failed to do any of this and there is simply no conceivable tactical reason for his failure to do so.

For the reasons discussed above, there is a strong likelihood that had counsel performed adequately, the result of the trial would have been different. Further failing to lodge objections denied Franklin his right to appeal by failing to preserve errors that are evident from a review of the trial record. This provides a separate ground for this court to grant relief.

Franklin shows actual arguments and substantial prejudice from his trial counsel's deficient performance.

GROUND SEVEN

Franklin Was Denied His Rights To Effective Assistance of Appellate Counsel

Franklin has a State and Federal Constitutional Right to the Effective Assistance of Appellate Counsel. U.S Const. Amend. 5, 6, 14; Wash Const. Art. 1, Sec. 3 and 22; Smith v. Robbins, 528 U.S. 259, 285 (2000); In Re Pers. Restraint of Maxfield, 133 Wn.2d 332, 945 O.2d 196 (1997).

A petitioner who raises an ineffective assistance of counsel claim on collateral review must show:

(1) that the legal issue appellate counsel failed to raise had merit and

(2) that he or she was actually prejudiced by appellate counsel's failure to raise the issue. Mayfield, supra.

"Failure of counsel on appeal to uphold his duty of raising and conscientiously advocating non-frivolous arguments on behalf of defendant constitutes a denial of his right to assistance of counsel. State v. Jones, 26 Wn. App. 1, 612 P.2d 404 (1980). See also In Re Morris, 288 P.3d 1140 (2012) (Appellate Counsel's failure to raise issue of violation of right to public trial was ineffective assistance of counsel).

Each of Franklin's grounds for relief are all evident from the trial record. Had appellate counsel raised these issues, there is a reasonable probability that Franklin would have obtained relief on direct appeal. The record shows appellate counsel did not attempt to review the whole record, in regards to possible errors, thus denying Franklin a record of sufficient completeness. See Draper v. Washington, 372 U.S. 487 (1963). Had counsel ordered the verbatim report of jury voir dire and opening statements to the jury, there is a reasonable probability of finding prosecutorial misconduct and public trial violations, warranting a new trial.

Franklin's clerk's notes show errors that were not raised and thus appellate counsel's failure to review these errors constitutes more deficient and prejudicial performance. Because Franklin was denied his rights to effective appellate counsel, Franklin was also denied his right to appeal his conviction and due process of law. Wash. Const. Amend. 14.

Franklin should be afforded a Direct Review, standard of review and reversal of his unlawful convictions.

GROUND EIGHT

Cumulative Error Deprived Franklin of His Rights to a Fair Trial

The United States Supreme Court has clearly established that the combined effect of multiple trial court errors violated due process where it renders the criminal trial fundamentally unfair. Chambers v. Mississippi, 410 U.S. 284, 298 (1973) (Combined effect of individual errors "denied Chambers a trial in accord with traditional and fundamental standards of due process and deprived Chambers a fair trial"). The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. Chambers, 410 U.S. at 290 n.3. Where the combined effect of individually harmless errors renders a criminal defense "far less persuasive than it might otherwise have been," the resulting conviction violates due process. Chambers, 410 U.S. 294. Franklin submits the cumulative effect of the constitutional errors in his case violated his rights to a fundamentally fair trial and violates due process of law. U.S. Const. Amend 5, 6, 14.

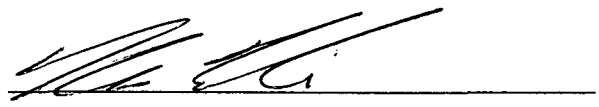
Relief must be granted for the cumulative effect of errors.

D. Request for Relief

Franklin has made a prima facie showing of constitutional errors that have caused actual and substantial prejudice to his rights to a fair trial.

For the forgoing reasons, reversal of his convictions is warranted.

Respectfully Requested this 14 day of April, 2015.



Kevin W. Franklin